84003-2

Supreme Court No. _____
Court of Appeals No. 26996-5-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ALBERTO PEREZ-VALDEZ,

Defendant/Petitioner.

PETITION FOR REVIEW

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Petitioner, Alberto Perez-Valdez, asks this Court to accept review of the Court of Appeals decision terminating review, designated in Part II of this petition.

II. COURT OF APPEALS DECISION.

Petitioner seeks review of the Court of Appeals decision filed November 17, 2009, which affirmed his conviction. A copy of the Court's unpublished opinion is attached as Appendix A. This petition for review is timely.

III. ISSUES PRESENTED FOR REVIEW.

1. Should evidence that the girls burned down a foster parent's home have been admitted under ER 404(b) to show motive, i.e. that the girls would go to any means to get out of a living situation they did not like?

2. Should defense counsel have been allowed to mention in closing argument evidence regarding Mr. Perez-Valdez's moral character, where the State failed to timely object to the character evidence?

3. Should the trial court have granted the motion for a mistrial where the CPS investigator testified that the alleged victims were telling the truth?

IV. STATEMENT OF THE CASE.

Alberto Perez-Valdez and his wife Ramona cared for a number of adopted children including—Samantha, her younger sister Ashley, her stepsister Ana, and five stepbrothers. RP 47-49[1]. The three girls resented the living situation because they thought it was unfair they had to help with the housework chores. RP 62-63, 99. Samantha and Ana also resented that Mr. Perez-Valdez and his wife would not allow them to have boyfriends at ages 10-13 and 11-14, respectively. RP 78, 101. However, Ana said she had lots of boyfriends on the sly. RP 102.

In December 2004, Samantha and Ana accused Mr. Perez-Valdez of raping them repeatedly between the ages of 10-13 and 8-14, respectively. RP 49-58, 81-84. Samantha testified that Mr. Perez-Valdez fully penetrated her with his eight-inch penis over 500 times. He did not use a condom but withdrew before ejaculation. RP 67-74, 147. She also said she had unprotected sexual intercourse with her stepbrother Jose about once per month over the same 3-year period. RP 75-76. Samantha said she began having menstrual periods before the time frame in which

[1] Citations to the transcript of the trial and sentencing will be designated "RP" followed by the page number(s). Citations to the supplemental transcript (jury voir dire and opening statements of counsel) will be designated "Supp. RP" followed by the page number(s).

she had sex with Mr. Perez-Valdez. RP 66. She never became pregnant and testified she was not infertile. RP 78. She was examined by a doctor after being removed from the Perez-Valdez house. She did not suffer any health problems or contract any sexually transmitted diseases as a result of these alleged incidents. RP 66-67. There was no evidence of any scarring or disruption of her hymeneal tissue. RP 149.

Ana testified Mr. Perez-Valdez had sexual intercourse with her 72-84 times per year over a three-year period. He did not use a condom—except for one time when it broke—but usually withdrew before ejaculation. RP 87, 95. Ana admitted having sexual intercourse with her stepbrother Jose "pretty often" over the two-year period preceding her removal from the house. Jose did not use a condom and ejaculated inside her. RP 112-13, 115. Ana began having menstrual periods at age 11 or 12. RP 155. She never became pregnant as a result of these alleged numerous sexual episodes. She was examined by a doctor after being removed from the Perez-Valdez house. She had a disruption to the back portion of her hymen, described by the doctor as the 6:00 position. RP 143-44. She did not suffer any health problems or contract any sexually transmitted diseases as a result of these alleged incidents. RP 114-15.

Dr. Regina Karmy, an Obstetrician and Gynecologist, testified as an expert witness. RP 351-54. She stated that the percentage of women who have sufficiently elastic tissues to allow penetration without laceration of the hymen is rare—less than 10%. RP 356. She also stated it was possible but not probable that a girl Ana's age would have only a single isolated laceration of the hymen at the 6:00 position if she had been penetrated vaginally as many times as she alleged. RP 357-59.

Dr. Karmy also testified that the likelihood of pregnancy using the withdrawal method over the course of one year is about 85%. RP 357, 359-60. She also testified that the likelihood of bladder infection from vaginal penetration would be fairly high in prepubescent girls, i.e. 10-12 years old. RP 359.

Ana did not tell the truth much of the time. RP 62. She admitted she had a bad reputation for lying and being manipulative, which frustrated both her mother and her school teachers. RP 88-91. Her middle school principal testified that Ana would rather fabricate a story than tell the truth. RP 339-42. Sheila Woelfle, the detention/timeout supervisor at the middle school, testified Ana had a reputation for being untruthful, especially with the faculty. Ms. Woelfle testified Ana's degree of lying was "significantly above average." Ms. Woelfle had personally had Ana

lie to her and witnessed her lying to the principal with a straight face looking them right in the eye so convincingly that they would have believed her had they not known the true facts. RP 225-30.

Ms. Woelfle also recalled a personal discussion with Ana in which Ana said she would do whatever she needed to do to get out of the Perez-Valdez house and be reunited with her biological mother. At no time did Ana suggest she was being sexually abused. RP 229.

Sometime during this same three-year period but before allegations were made by Samantha and Ana, Samantha's younger sister Ashley was removed from the house after Ashley alleged she was molested by Mr. Perez-Valdez.[2] RP 63-64. At that time CPS workers asked Samantha and Ana if they had been sexually abused by Mr. Perez-Valdez. Both girls said "no" and continued to say "no" for several years. RP 63-64, 92-93. Samantha and Ana knew that Ashley got removed from the house by accusing Mr. Perez-Valdez of molesting her. RP 63, 91-92. Ana knew allegations of sexual abuse would get her removed from the Perez-Valdez house, too. RP 99.

[2] But testimony by Ashley's foster parent and aunt indicate Ashley likely fabricated these allegations. She continued her behavior of lies, manipulation and threats to get what she wanted after being placed in a foster home. See RP 211-24.

The general theory of the defense case was that Samantha and Ana, having seen that allegations of sexual abuse resulted in Ashley's removal from the Perez-Valdez house, fabricated these allegations to achieve the same result. RP 60-78, 88-99, 396-400, 408-20. As further proof of this motive, defense counsel moved to present evidence that the girls had burned down the foster home in which they were placed after their removal from the Perez-Valdez home. He argued such evidence was permissible under ER404(b) to show motive, i.e. that the girls would go to any means to get out of a situation they didn't like. RP 104-08. The record reveals that Ana and Samantha set Ginger Burnette's home on fire because they wanted out of there. They didn't like the vegetarian diet, the religious atmosphere, and having to go to church all the time. RP 105-10. Ana stated she didn't think committing first degree arson was bad. RP 109-10.

The court held it would be "unfair" to show that Ana is an arsonist:

> [Y]ou [defense counsel] haven't really shown that she just hated this house. Was she unhappy? She is unhappy as half the teenaged kids in any house are. Everybody is unhappy with parents. They don't like the rules, they don't like this or that, but we don't put in evidence of burning a house down.

RP 108

Ginger Burnette, called as a State's witness, testified that Ana never had any particular desire to leave her home, and that Samantha only wanted to leave because Ms. Burnette's home was just "too nice." RP 185, 190. When asked on cross examination whether the girls took extreme measures to get out of her home, Ms. Burnette answered "no." RP 192.

Defense counsel then renewed his motion to allow in the arson evidence lest the jury be left with the impression that nothing of consequence happened to cause the removal of the girls from Ms. Burnette's home. RP 193. The court denied the motion finding the arson incident to be a collateral issue only. RP 194.

Karen Patton was the CPS investigator in this case. RP 290. The record on cross examination reveals her immediate obvious hostility toward defense counsel in her answers. RP 301-02. She asserted that the girls' ability to describe their parents' bedroom was consistent with continual sexual abuse: "So I'm saying these children knew what the parents' bedroom looked like, and in addition, they were in there several times being sexually abused by their father." Defense counsel: "Assuming they are telling the truth?" Ms. Patton: "They are telling me the truth." RP 301-02.

Defense counsel immediately objected and moved for a mistrial based on Ms. Patton's remark about the girls telling the truth. The court sustained the objection, asked the jury to disregard Ms. Patton's comment, but denied the motion for a mistrial. RP 302. Defense counsel later moved for a new trial on the same basis—that Ms. Patton vouched for the girls' credibility. The court denied the motion. RP 441-45.

Mr. Perez-Valdez presented a number of witnesses who testified without objection they had known Mr. Perez-Valdez for a considerable time at the farm labor camp where he lives, that his general moral character and reputation was very good, and they had never witnessed anything inappropriate in his relationship with his adopted daughters. RP 203-04, 207-08, 262-67. Later on, the State moved to strike this character evidence as being contrary to the holding in State v. Griswold. The court granted the motion and agreed to give a written jury instruction even though the State failed to object at the time. RP 333-36. During the jury instruction conference, the court and the parties agreed not to give the instruction but defense counsel was prohibited from mentioning anything about moral character in closing argument.

The jury convicted Mr. Perez-Valdez of second degree rape and third degree rape. RP 437-38. This appeal followed. CP 73-74.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this Court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this Court, the U.S. Supreme Court and the Court of Appeals (RAP 13.4(b)(1) and (2)), and involves a significant question of law under the Constitution of the United States and state constitution (RAP 13.4(b)(3)). First, the Court of Appeals decision affirming the trial court's evidentiary ruling excluding evidence that the girls burned down a foster parent's home was contrary to the provisions of ER 404(b) that allows such evidence to show motive. *See* State v. Monschke, 133 Wn. App. 313, 135 P.3d 966 (2006), *rev. denied*, 159 Wn.2d 1010, 154 P.3d 918, *cert. denied*, --- U.S. ----, 128 S.Ct. 83, 169 L.Ed.2d 64 (2007).

Second, the Court of Appeals decision affirming the trial court's ruling not allowing defense counsel to mention evidence regarding Mr. Perez-Valdez's moral character in closing argument was contrary to the provisions of ER 103(a)(1) because the State failed to timely object to the character evidence when it was presented. *See* State v. Gray, 134 Wn. App. 547,138 P.3d 1123 (2006).

Finally, the Court of Appeals decision affirming the trial court's ruling denying Mr. Perez-Valdez's motion for a mistrial, where the CPS investigator testified that the alleged victims were telling the truth, violated his constitutional right to a fair trial before an impartial jury. *See* State v. Babcock, 145 Wn. App. 157, 185 P.3d 1213 (2008); State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993); State v. Carlin, 40 Wn. App. 698, 700 P.2d 323 (1985).

1. Evidence that the girls burned down a foster parent's home should have been admitted under ER 404(b) to show motive, i.e. that the girls would go to any means to get out of a living situation they did not like.

A trial court's ruling on a motion in limine or the admissibility of evidence will be reversed if the court abuses its discretion. Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 283, 840 P.2d 860 (1992); State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists. Davis v. Globe Mach. Mfg. Co., 102 Wn.2d 68, 77, 684 P.2d 692 (1984).

Under ER 401, evidence is "relevant" if it has any tendency to make the existence of any fact that is of consequence to the determination

of the action more probable or less probable than it would be without the evidence. ER 404(b) prohibits the admission of otherwise relevant evidence to show the character of a person to prove that the person acted in conformity with that character on a particular occasion. State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002). Although inadmissible to prove propensity on a particular occasion, evidence of prior acts may be admissible for other purposes, including proof of motive, intent, modus operandi, or a common scheme or plan. State v. Monschke, 133 Wn. App. 313, 323, 335, 135 P.3d 966 (2006), *rev. denied*, 159 Wn.2d 1010, 154 P.3d 918, *cert. denied*, --- U.S. ----, 128 S.Ct. 83, 169 L.Ed.2d 64 (2007).

Here, defense counsel moved to present evidence that the girls had burned down the foster home in which they were placed after their removal from the Perez-Valdez home. He argued such evidence was permissible under ER 404(b) to show motive, i.e. that the girls would go to any means to get out of a living situation they didn't like, and did so in the present case. RP 104-08. Defense counsel had already elicited testimony that Samantha and Ana, having seen that allegations of sexual abuse resulted in Ashley's removal from the Perez-Valdez house, fabricated

these allegations to achieve the same result because they didn't like doing chores and not being allowed to have boyfriends. RP 60-78, 88-99.

The 404(b) evidence would have shown that Ana and Samantha set Ginger Burnette's home on fire for the same motive—to get out of a living situation they did not like. The evidence would have revealed these girls would burn down a house for such trivial reasons as not liking the vegetarian diet, the religious atmosphere, and having to go to church all the time, and that Ana didn't think committing first degree arson was bad. RP 105-10. This evidence shows the girls' total lack of remorse for committing heinous acts, as well as a perverted sense of right and wrong as long as they get what they want. It was relevant to show that these girls were perfectly capable of fabricating allegations as serious as sexual abuse to get out of a living situation they did not like. Therefore, the trial court erred in not allowing the 404(b) evidence to show motive. The court's ruling that it would be "unfair" to show that Ana was an arsonist is not an adequate basis to deny admission of this relevant evidence.

After the court's ruling, Ginger Burnette testified that Ana never had any particular desire to leave her home, and that Samantha only wanted to leave because Ms. Burnette's home was just "too nice." RP 185, 190. When asked on cross examination whether the girls took

extreme measures to get out of her home, Ms. Burnette answered "no." RP 192. The court's further denial of defense counsel's renewed motion following this testimony is even more egregious. The testimony is obviously untrue given the fact of the arson, and leaves the jury with the impression that nothing of consequence happened to cause the removal of the girls from Ms. Burnette's home. Furthermore, the arson evidence became even more relevant to refute the testimony of Ms. Burnette, and was also admissible for the legitimate purpose of impeachment. See ER 607.[3] Therefore, the court committed additional error by again excluding this evidence.

2. Defense counsel should have been allowed to mention in closing argument evidence regarding Mr. Perez-Valdez's moral character where the State failed to timely object to the character evidence.

To assign error to a ruling that admits evidence, a party must raise a timely objection on specific grounds. ER 103(a)(1); State v. Gray, 134 Wn. App. 547, 557,138 P.3d 1123 (2006). To be timely, the party must make the objection at the earliest possible opportunity after the basis for

[3] ER 607 provides: The credibility of a witness may be attacked by any party, including the party calling the witness.

the objection becomes apparent. State v. Jones, 70 Wn.2d 591, 597, 424 P.2d 665 (1967). In Gray, the court of appeals held the defendant waived any objection when he failed to object to the admission of a judgment and sentence establishing one of his prior convictions by waiting until the State rested to move to dismiss based on the inadequacy of the judgment and sentence. Gray, 134 Wn. App. at 557-58,138 P.3d 1123.

Here, Mr. Perez-Valdez presented a number of witnesses who testified without objection they had known Mr. Perez-Valdez for a considerable time at the farm labor camp where he lives, that his general moral character and reputation was very good, and they had never witnessed anything inappropriate in his relationship with his adopted daughters. RP 203-04, 207-08, 262-67. Later on, the State moved to strike all this character evidence as being contrary to the holding in State v. Griswold. The court granted the motion and agreed to give a written jury instruction even though the State failed to object at the time. RP 333-36.

The State clearly waived any objection by failing to object when defense counsel inquired about Mr. Perez-Valdez's moral character reputation. Pursuant to the legal authority cited above, the trial court erred in granting the State's motion and agreeing to give a written jury

instruction. The fact that the parties later agreed not to give the instruction does not alleviate the error, since defense counsel was prohibited from mentioning anything about moral character in his closing argument, which he should have been allowed to do.

3. The trial court should have granted the motion for a mistrial where the CPS investigator testified that the alleged victims were telling the truth.

A trial court should grant a mistrial when an irregularity in the trial proceedings is so prejudicial that it deprives the defendant of a fair trial. State v. Babcock, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008), *citing* State v. Post, 59 Wn. App. 389, 395, 797 P.2d 1160 (1990), *aff'd*, 118 Wn.2d 596, 826 P.2d 172, 837 P.2d 599 (1992); State v. Johnson, 60 Wn.2d 21, 371 P.2d 611 (1962). In determining whether a trial irregularity deprived a defendant of a fair trial, our appellate courts examines several factors: (1) the seriousness of the irregularity, (2) whether challenged evidence was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987) (citing State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983)). Because

the trial judge is in the best position to determine the prejudice of circumstances at trial, an appellate court reviews the decision to grant or deny a mistrial for abuse of discretion. Weber, 99 Wn.2d at 166, 659 P.2d 1102.

Seriousness of the Irregularity. In Babcock, this Court viewed as "extremely serious" the admission of hearsay testimony concerning the charge as to one of the alleged child rape victims, which was dismissed. The Court found the effect of this testimony on the jury may be analogized to the effect of the admission of evidence of other bad acts under ER 404(b). Babcock, 145 Wn. App. at 163-64, 185 P.3d 1213; See also Escalona, 49 Wn. App. at 255, 742 P.2d 190 (holding trial court should have granted mistrial where witness stated that defendant charged with assault had previously stabbed someone).

Furthermore, in Babcock as well as in the present case, there was no physical evidence or eyewitness testimony corroborating the allegations concerning either alleged victim. The verdict depended solely on the jury's credibility determinations about the alleged victims' testimony. And, that testimony was at times inconsistent. Babcock, 145 Wn. App. at 164, 185 P.3d 1213. In addition, in the present case there is evidence of Ana being untruthful and of both girls having a strong motive to fabricate the alleged

abuse. Consequently, the testimony at trial by an expert witness that Ana and Samantha were telling the truth, had a high potential for prejudice, and represents a serious irregularity.

More significantly, expert witnesses may not state an opinion about a victim's credibility because such "testimony invades the province of the jury to weigh the evidence and decide the credibility of witnesses." State v. Jones, 71 Wn. App. 798, 812, 863 P.2d 85 (1993) (*citing* State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992); State v. Madison, 53 Wn. App. 754, 760, 770 P.2d 662, *rev. denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989)), *rev. denied*, 124 Wn.2d 1018, 881 P.2d 254 (1994). It is also well-established that no witness may testify as to an opinion on the guilt of the defendant, whether directly or inferentially. See State v. Haga, 8 Wn. App. 481, 492, 507 P.2d 159, *rev. denied*, 82 Wn.2d 1006 (1973).

Here, Karen Patton's statement that the girls were telling the truth plainly indicated her opinion that she believed Mr. Perez-Valdez had molested Samantha and Ana. The trial court's failure to grant a mistrial was error because this irregularity in the trial proceedings was so prejudicial that it deprived Mr. Perez-Valdez of a fair trial. This error is of constitutional magnitude because it invades the province of the jury. State

v. Carlin, 40 Wn. App. 698, 703, 700 P.2d 323 (1985); Stepney v. Lopes, 592 F.Supp. 1538, 1547-49 (D.Conn.1984). Both the federal and state constitutions guarantee a criminal defendant the right to a trial before an impartial jury. State ex rel. McFerran v. Justice Ct., 32 Wn.2d 544, 549, 202 P.2d 927 (1949). Thus a witness' opinion as to the defendant's guilt is not only just a serious irregularity. It violates the defendant's jury trial right by invading the province of the impartial fact-finder. Id.; Carlin, 40 Wn. App. at 702, 700 P.2d 323.

Cumulative Evidence. The evidence that the girls were telling the truth was not cumulative of evidence concerning the alleged rapes. Because the evidence was not cumulative of other evidence properly admitted, this factor weighs in favor of a mistrial. Id.

Effectiveness of Curative Instruction. The final consideration is whether the irregularity of admitting the opinion testimony could have been cured by the instruction to the jury to disregard the remark. Here, the trial court properly instructed the jury to disregard the opinion testimony. While it is presumed that juries follow court instructions to disregard testimony, *see* Weber, 99 Wn.2d at 166, 659 P.2d 1102 (1983), no instruction can " 'remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress

itself upon the minds of the jurors.' " Escalona, 49 Wn. App. at 255, 742 P.2d 190 (1987) (alteration in original) (*quoting* State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)).

In Escalona and Miles, the Courts found the admission of evidence concerning a crime similar to the charged offenses was inherently difficult to disregard. Escalona, 49 Wn. App. at 255-56, 742 P.2d 190; Miles, 73 Wn.2d at 71, 436 P.2d 198 (involving stricken testimony that defendant had committed robbery similar to that charged). In Babcock, this Court held the admission of hearsay testimony of sexual abuse concerning the charge as to one of the alleged child rape victims that was dismissed, was so highly prejudicial that there was no guarantee the jury could effectively disregard that evidence. Babcock, 145 Wn. App. at 165, 185 P.3d 1213, *citing* State v. Suleski, 67 Wn.2d 45, 51, 406 P.2d 613 (1965).

Herein, the situation is even more serious than Escalona, Miles, and Babcock because it involves an opinion of guilt on the current charges, not just other 404(b) type evidence on former charges or dismissed charges. Such a statement of truthfulness by an expert witness is just too inherently prejudicial to be cured by an instruction to disregard it. Therefore, the trial court should have granted the mistrial.

VI. CONCLUSION.

For the reasons stated herein, Defendant/Petitioner, Alberto Perez-Valdez, respectfully asks this Court to grant the petition for review and reverse the decision of the Court of Appeals affirming his conviction.

Respectfully submitted December 15, 2009,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 26996-5-III**
	)	
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
ALBERTO PEREZ-VALDEZ,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	

KULIK, A.C.J. — A jury convicted Alberto Perez-Valdez of second and third degree rape of a child. He appeals, arguing the trial court made several evidentiary errors and improperly denied Mr. Perez-Valdez's motion for a mistrial when an investigator testified that alleged child victims were telling the truth.

Mr. Perez-Valdez's assertions of error are without merit. Therefore, we affirm his convictions.

FACTS

Alberto Perez-Valdez and his wife, Ramona Valdez, adopted a number of children, including Samantha, Ana, Ashley, and five boys. The three girls felt Mr. and Ms. Perez-Valdez treated them unfairly because the girls believed they had to do more chores than the boys. Samantha and Ana, while ages 10 to 13 and 11 to 14 respectively, were also unhappy because they were not allowed to have boyfriends. Before Samantha and Ana alleged sexual abuse, the State removed Ashley, the youngest of the girls, from the Perez-Valdez household after she reported that Mr. Perez-Valdez was sexually abusing her. Ashley later recanted her statements of abuse.

In December 2004, Samantha, age 13, and Ana, age 14, accused Mr. Perez-Valdez of raping them repeatedly over a number of years. Samantha testified that Mr. Perez-Valdez had intercourse with her about 3 times a week from ages 10 through 13. Ana testified that Mr. Perez-Valdez had intercourse with her about 6 times a month from ages 8 through 14. Both girls testified that Mr. Perez-Valdez did not use a condom except once and would pull out before ejaculation. Samantha and Ana testified that their stepbrother, Jose, also had sex with them.

At trial, Mr. Perez-Valdez asserted that Samantha and Ana made up allegations of sexual abuse to get out of the Perez-Valdez home. Mr. Perez-Valdez argued that Samantha and Ana knew they would be taken out of the home if they said they were being sexually abused because their sister was removed after making similar allegations.

The court denied admission of evidence that Samantha and Ana had burned down a foster home after they were removed from the Perez-Valdez home. Ana was later convicted of first degree arson. The defense argued that this evidence showed that the girls would do anything to get out of a living situation they did not like. The court found that the evidence of the arson would be too prejudicial.

Several witnesses testified about Mr. Perez-Valdez's good moral character. Later in the trial, the court granted the State's motion to strike the character evidence. During the jury instruction conference, the parties agreed on the record not to give a curative instruction and that defense counsel would not mention moral character in closing argument.

Karen Patton, the CPS[1] investigator, testified that the girls' knowledge of their parents' bedroom was consistent with continual sexual abuse. The following exchange took place at trial:

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[1] Child Protective Services.

> [Defense Counsel:] Are you telling me only children sexually abused would know what their mother and father's room looked like if they had been in there five, six, seven or eight years?
>
> [Ms. Patton:] No, not at all, but each family has rules, and some families don't allow the children in the parents' bedroom. That's a private space. So I'm saying these children knew what the parents' bedroom looked like, and in addition, they were in there several times being sexually abused by their father.
>
> [Defense Counsel:] Assuming they are telling you the truth?
>
> [Ms. Patton:] They are telling me the truth.

Report of Proceedings (RP) at 301-02.

Defense counsel objected immediately and moved for a mistrial based on Ms. Patton's assertion that the girls were telling the truth. The court denied the motion for mistrial, but sustained the objection and immediately instructed the jury to disregard Ms. Patton's remark. Later, defense counsel moved again for a new trial based on Ms. Patton's comment. The court again denied that motion.

The jury convicted Mr. Perez-Valdez of second and third degree rape of a child. Mr. Perez-Valdez appeals.

ANALYSIS

Mr. Perez-Valdez asserts that the trial court erred by: (1) preventing him from introducing evidence of the girls committing arson to show motive under ER 404(b), (2) prohibiting defense counsel from mentioning Mr. Perez-Valdez's moral character in closing argument even though the State failed to timely object to character evidence, and

(3) denying the motion for a mistrial when Ms. Patton testified the girls were telling the truth.

Motive Evidence. The trial court's decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion. *State v. Stein*, 140 Wn. App. 43, 65, 165 P.3d 16 (2007). The trial court abuses its discretion if its decision is based on manifestly unreasonable or untenable grounds. *Id.*

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Relevant evidence is admissible; irrelevant evidence is not. ER 402. The trial court may exclude relevant evidence if its probative value is substantially outweighed by its prejudicial effect. ER 403. Character evidence is not admissible to show that the person acted in conformity on a particular occasion, but is admissible for other purposes such as motive. ER 404.

Mr. Perez-Valdez argues that Samantha and Ana would go to any lengths to get out of a living situation they considered to be unhappy. Mr. Perez-Valdez testified that the girls made false accusations of sexual abuse and burned down a foster parent's house so they could leave those homes. In considering admitting evidence of the arson, the trial court stated: "[I]t's going to depend on what the testimony is. If there is some testimony

that [Samantha and Ana] just couldn't wait to get out of the home of the defendant, and boy they would do just about anything to get out of there, then maybe the fact that they did do something like this to get out of another foster home, I'll take a long, hard, look at it. But we have to lay that foundation first." RP at 22. Neither Samantha nor Ana testified they would do anything to get out of a living situation they did not like. Therefore, Mr. Perez-Valdez's argument that the arson evidence shows motive in regard to allegations of sexual abuse is tenuous at best.

Generally, bad acts are not admissible evidence because they are more prejudicial than probative. *State v. Sexsmith*, 138 Wn. App. 497, 506, 157 P.3d 901 (2007). Evidence of arson is highly prejudicial and the prejudicial effect greatly outweighs the probative value. Importantly, Mr. Perez-Valdez did not establish a connection between the fire and a false allegation of sexual abuse. The trial court did not abuse its discretion by excluding the arson evidence.

Character Evidence. A defendant has the right to present a defense as long as the evidence is relevant and not otherwise inadmissible. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). Character evidence is generally inadmissible under ER 404(a). Evidence of a pertinent character trait of the accused is an exception. ER 404(a)(1). In *State v. Griswold*, 98 Wn. App. 817, 991 P.2d 657 (2000), *overruled on other grounds by*

State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003), the defendant was found guilty of child molestation. On appeal, the court found that general moral character evidence was too broad to be a pertinent character trait under ER 404(a)(1), but that sexual moral character was admissible. *Griswold*, 98 Wn. App. at 829. Here, the court denied evidence of Mr. Perez-Valdez's general moral character.

The State did not object to Mr. Perez-Valdez's character witnesses until the day after the testimony. The State's objection was not timely. *See State v. Jones*, 70 Wn.2d 591, 597, 424 P.2d 665 (1967). However, the trial court granted the State's motion to strike the character evidence and agreed to give a jury instruction stating that the jury should disregard any character evidence that was presented.

Later, when the jury instructions were discussed, defense counsel again raised the State's untimely objection. The State then proposed an agreement stating, "Why don't we do this? Don't give the instruction, and obviously, [defense counsel] would be precluded from giving anything about moral character [in closing arguments]. I can live with that. We can get on with it." RP at 367. The court agreed, and defense counsel did not object; therefore, the parties made an agreement on the record. An agreement on the record is not reviewable on appeal, absent fraud or an attorney overreaching his authority. *Nguyen v. Sacred Heart Med. Ctr.*, 97 Wn. App. 728, 735, 987 P.2d 634 (1999).

Denial of Mistrial. A trial court's decision to grant or deny a mistrial is reviewed under the abuse of discretion standard. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

"A trial court should grant a mistrial when an irregularity in the trial proceedings is so prejudicial that it deprives the defendant of a fair trial." *State v. Babcock*, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008). The court examines the following factors to determine whether the defendant was denied a fair trial:

> (1) the seriousness of the irregularity; (2) whether challenged evidence was cumulative of other evidence properly admitted; and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow.

Id.

Mr. Perez-Valdez argues that he should have been granted a mistrial based on the exchange between defense counsel and Ms. Patton, the CPS investigator. Defense counsel immediately objected, moved to strike, and made a motion for mistrial. The court sustained the objection and instructed the jury to disregard the comment, but denied the motion for mistrial.

An expert may not testify to the guilt of a defendant or to the veracity of a witness. Such testimony invades the province of the jury to weigh the evidence and determine witness credibility. *State v. Jones*, 71 Wn. App. 798, 812, 863 P.2d 85 (1993).

The entire case rested on whether the jury believed the testimony of Samantha and Ana. Both the State and Mr. Perez-Valdez presented many witnesses to bolster or impeach Samantha's and Ana's testimony. The State presented expert witnesses who testified that Samantha's and Ana's statements and demeanors were consistent with victims of sexual abuse. Ms. Patton's testimony vouching for Samantha's and Ana's credibility was cumulative in that regard.

Lastly, the court must determine if a jury instruction can cure the irregularity. Here, the defense objected to Ms. Patton's testimony immediately, and the court instructed the jury to disregard Ms. Patton's comment. Furthermore, instruction 1 directed the jury to determine the facts of the case and informed the jury that it was the sole judge of witness credibility. Considering this was a multi-day trial with numerous witnesses, all of whom either supported or refuted Samantha's and Ana's testimony, the impact of Ms. Patton's statement likely did not have an effect on the outcome of the case. Ms. Patton's statement was not so prejudicial that it deprived Mr. Perez-Valdez of a fair trial. The curative instruction was sufficient to cure the irregularity.

The trial court did not abuse its discretion by denying Mr. Perez-Valdez a mistrial.

We affirm Mr. Perez-Valdez's convictions for second and third degree rape of a child.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, A.C.J.

WE CONCUR:

Sweeney, J.

Korsmo, J.